

FILED BY CLERK

SEP 23 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Petitioner,)	2 CA-SA 2011-0063
)	DEPARTMENT B
)	
v.)	<u>DECISION ORDER</u>
)	
HON. HOWARD FELL, Judge of the)	
Superior Court of the State of Arizona,)	
in and for the County of Pima,)	
)	
Respondent,)	
)	
and)	
)	
JERRY FLYNN WALKER,)	
)	
Real Party in Interest.)	
_____)	

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR20100062001

JURISDICTION ACCEPTED; RELIEF GRANTED

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ESPINOSA, Judge.

¶1 In this special action, the state challenges the trial court’s ruling excluding from trial certain evidence under Rule 404(b), Ariz. R. Evid. For the reasons that follow, we agree the court abused its discretion, and therefore accept jurisdiction, grant relief, and reverse.

Factual and Procedural Background

¶2 The state charged Jerry Walker with two counts of sale and/or transfer of a narcotic drug, arising from his having sold crack cocaine to the same police officer on two separate occasions. The trial court ordered the charges severed for trial, a ruling which the state does not challenge in this special action. In ordering severance, the court also stated that evidence of the second sale would not be admissible in a trial on the first sale. The state filed a motion for clarification, and the court reiterated that it would not allow the state to present evidence of the second sale at trial on the first sale, stating “the probative value [of the evidence] does not outweigh the danger of unfair prejudice to the defendant.” The state brought this special action.

Discussion

¶3 Special action jurisdiction is appropriate when, as here, a party has “no equally plain, speedy, and adequate remedy by appeal.” Ariz. R. P. Spec. Actions 8(a); *see State v. Bejarano*, 219 Ariz. 518, ¶ 15, 200 P.3d 1015, 1020 (App. 2008). And special action jurisdiction is particularly suitable when the issue presented is a purely

legal one. *Mendez v. Robertson*, 202 Ariz. 128, ¶ 1, 42 P.3d 14, 15 (App. 2002). Accordingly, we accept jurisdiction.

¶4 “[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Ariz. R. Evid. 404(b). Such evidence may be admitted, however, for a proper purpose, including to prove “identity.” *Id.* In this case, Walker has raised alibi and misidentification as possible defenses to the charges arising from the first sale. Thus, evidence that the officer who bought the drugs from him did so on another occasion and could therefore correctly identify him is highly probative on the question of identity and, contrary to the trial court’s apparent conclusion at the hearing, is generally admissible under Rule 404(b). *See State v. Padilla*, 122 Ariz. 378, 379, 595 P.2d 170, 171 (1979) (evidence of other drug sale admissible “to prove the accuracy of the identification of [defendant] by the officers”).

¶5 Otherwise admissible evidence may, however, “be excluded if its probative value is substantially outweighed by the danger of unfair prejudice” or by various other concerns. Ariz. R. Evid. 403. Although the trial court here stated it did not believe the probative value of the second-sale evidence outweighed the danger of prejudice to Walker, it did not “explain on the record its Rule 403 weighing process.” *Shotwell v. Donahoe*, 207 Ariz. 287, ¶ 33, 85 P.3d 1045, 1053-54 (2004). We agree with Walker that the admissibility of evidence is a matter for the trial court’s discretion, and we review its Rule 403 ruling for an abuse of that discretion. *State v. Fernane*, 185 Ariz. 222, 226, 914 P.2d 1314, 1318 (App. 1995). But in this case we see nothing in the record to suggest the

evidence is *unfairly* prejudicial to Walker. Evidence is not unfairly prejudicial merely because it will negatively impact the defendant's case. *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993). Rather "[t]he prejudice that Rule 403 speaks to is that which suggests a 'decision on an improper basis, such as emotion, sympathy, or horror.'" *Shotwell*, 207 Ariz. 287, ¶ 34, 85 P.3d at 1054, *quoting State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997). Nothing about the evidence of a second drug sale by Walker, which occurred under essentially the same circumstances as the first, would lead to such a decision. And that the state may have other evidence of his identity, although relevant in the Rule 403 weighing process, *see Shotwell*, 207 Ariz. 287, ¶ 34, 85 P.3d at 1054, does not, at least under the circumstance here, make evidence of the officer's face-to-face identification at the second drug sale *unfairly* prejudicial.

Disposition

¶6 Accordingly, we conclude the trial court abused its discretion in precluding the evidence, and we grant relief by reversing that portion of the trial court's order excluding the evidence of the second drug transaction in Walker's first trial.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

Presiding Judge Vásquez and Judge Kelly concurring.